



The Comptroller General  
of the United States

Washington, D.C. 20548

Kildee

## Decision

Matter of: ITT Base Services, Inc.; RCA Corporation; and  
Pan Am World Services, Inc.  
File: B-220518.2  
Date: November 10, 1986

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### DIGEST

1. Protest that the agency's estimate of the amount of work covered by Davis Bacon Act minimum wage requirements is based on inaccurate information is denied where the record does not establish the claimed inaccuracies.
2. When criteria used by the procuring agency to classify previous repair and minor construction work as subject to the Davis Bacon Act reasonably reflect the requirements of the statute, they may be used to estimate the amount of Davis Bacon Act work offerors should expect to perform under a subsequent contract.
3. Protest that agency's estimate of the amount of work included under Davis Bacon Act minimum wage requirements is based on prior work that was not performed by government employees and will not be included in the contract is denied where the allegation is unsupported by the record.
4. Protest that procuring agency used terms for estimating work covered by the minimum wage requirements of the Davis Bacon Act that are inconsistent with the definition of those terms in agency regulations governing organizational responsibilities and accounting requirements is denied where those regulations were not drafted to implement the Act.

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### DECISION

ITT Base Services, Inc. (ITT), RCA Corporation (RCA), and Pan Am World Services, Inc. (Pan Am), protest that the Department of the Army failed to comply with an earlier decision of this Office, Dynalelectron Corp., B-220518, Feb. 11, 1986, 65 Comp. Gen. \_\_\_, 86-1 CPD ¶ 151, concerning the application of the Davis Bacon Act, 40 U.S.C. § 276(a) (1982), to request for proposals (RFP) No. DAKF06-85-R-0052. The procurement involves a cost comparison under Office of Management and

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Budget Circular A-76 to determine whether the Army should continue performing base maintenance services at Fort Carson, Colorado, with government personnel or have them performed by a commercial firm. In our earlier decision, we held that the Army had overstated the amount of work subject to the minimum wage requirements of the Davis Bacon Act to the detriment of commercial firms in the cost comparison process. We now conclude that the Army's revised solicitation complies with the Act's requirements, and we deny the protest.

The Contracting Division, Fort Carson, issued the solicitation on February 1, 1985, seeking offers to perform base operations and maintenance services on a cost-plus-award-fee basis. It plans to award a contract for a base year and 4 option years if commercial performance proves more economical than continued performance by government employees. The services include a broad spectrum of activities such as operation of the base railroad and water systems and road maintenance, as well as a category entitled "project work," which involves separate work orders for repair and minor construction projects that use carpentry, plumbing, electrical, and similar skills.

In Dynalelectron, we found that the solicitation estimate of the number of contractor employees subject to the minimum wage requirements of the Davis Bacon Act was erroneous because it was premised upon a misreading of that Act. In particular, we concluded that the Army erred when it applied the Davis Bacon Act's minimum wage requirements to all project work simply because the cumulative total of the estimated work orders exceeded the Act's \$2,000 threshold, rather than applying the \$2,000 threshold to each individual work order. Additionally, we questioned the classification of certain activities, such as repairing a meat slicer, as falling within the Davis Bacon Act, since such work was not "construction, alteration and/or repair, including painting and decorating, of public buildings or public works" as required by the statute. This misclassification was important because Davis Bacon Act wage rates are generally higher than those for comparable skills under the Service Contract Act, 41 U.S.C. 351-358 (1982), which is otherwise applicable. The more work that offerors must consider as subject to the Davis Bacon Act for purposes of preparing cost proposals, the higher those proposals will be relative to the Army's estimate for performing the work with government employees.

In response to our decision, the Army issued amendment No. 17 to the solicitation to correct its estimate of work subject to the Davis Bacon Act. This included establishing a \$2,000 threshold for Davis Bacon Act activities initiated under the "project work" category and lowering the estimated number of staff days covered by the Act by approximately 10 percent. The Army's revised estimate was prepared by reviewing all orders issued for repair work on the installation during a sample period, October 1, 1985, through March 4, 1986, and separating them into those that would be governed by wage rates prescribed by the Davis Bacon Act and those within the Service Contract Act. These labor hours were then used to estimate the amount of Davis Bacon Act activity which would be required each year under the base support contract.

#### ACCURACY OF SAMPLE WORK ORDERS

ITT first questions whether a number of work orders should have been included in the sample group categorized by the Army and used to estimate the amount of Davis Bacon Act work. The protester's concerns stem largely from the brevity of the work descriptions in the Army's work papers, but prove to be unsubstantiated in light of additional information supplied by the Army. For example, ITT asserts that the job listed as "Vinyl Siding Misc. Bldg.," with an estimated cost of \$480,407, was contracted out to a private construction firm and should not have been counted as work performed by Fort Carson's government employees during the sample period. The Army explains that this item covered work done by its employees to prepare the buildings for the installation of siding, not the actual installation of siding, which was done under contract. Similarly, ITT contends that a \$208,588 project described as "Tent City Renovation" was actually performed in 1984, well in advance of the sample period. The Army explains that although Tent City was initially constructed in 1984, its renovation was initiated during the period reviewed. In our view, only one of ITT's concerns about the sampling group is valid--the estimated cost to replace a 3-way valve should have been \$144,237 instead of \$13,379--but that error involved only the cost estimate, and did not affect the Davis Bacon Act labor estimate.<sup>1/</sup>

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<sup>1/</sup> We note one obvious error in the sampling group not raised by ITT, the inclusion of project FH00001J for snow removal in both Davis Bacon Act and Service Contract Act labor categories. However, the 120 hours involved are insignificant and would not have had a meaningful affect on the labor hour estimates.

ITT argues that the Army should have used work orders completed during the sample period rather than work orders issued. According to the protester, this would have permitted analysis on the basis of actual labor expended, which is more accurate than the estimated amount of labor used to initiate work orders. The Army responds that its estimates were established by trained estimators using standard estimating techniques.

Assuming that accurate records of completed work were readily available, they would have provided the most accurate record of Davis Bacon Act work. We think, however, that the estimated hours are a reasonable indicator of Fort Carson's experience, and ITT has not suggested that the estimates are biased or inherently inaccurate in a manner that would increase the Army's estimate of Davis Bacon Act work as opposed to other work. Consequently, we do not believe that the Army was required to use actual workload figures as a basis for its estimates.

#### STANDARD FOR CLASSIFYING SAMPLE WORK ORDERS

ITT alleges that even if the sample group of work orders provides a valid basis for analysis, that analysis was not performed properly and resulted in misclassification of repair services as Davis Bacon Act work. In this regard, ITT questions the Army's technique of simply categorizing all the work orders reviewed as subject to either the Davis Bacon Act or the Service Contract Act without regard to the contractor's responsibilities for facilities operation and maintenance. According to ITT, repair work incident to maintenance must be classified under the Service Contract Act. Therefore, ITT argues, the Army should determine whether each work order in the sample group concerns a project within the scope of the RFP provisions addressing facilities operation and maintenance; those that are, ITT concludes, involve repair incident to maintenance which should be classified under the Service Contract Act.

Applying this method of analysis, ITT concludes that the Army improperly classified 120 of 370 work orders as subject to the Davis Bacon Act, since there are specific operation and maintenance provisions of the performance work statement that might encompass the work. For example, because the contractor must operate and maintain a natural gas distribution system, which includes repair or replacement of malfunctioning gas valves, ITT contends that a \$50,000 repair/replacement project for gas valves is "repair incident to

maintenance" and already included in the maintenance provisions of the RFP.

The Davis Bacon Act's minimum wages apply to segregable projects under this procurement that exceed \$2,000 and consist of "construction, alteration, and/or repair, including painting and decorating, of public buildings or public works." 40 U.S.C. § 276a(a); Dynalelectron Corp., supra. The implementing regulation, 29 C.F.R. § 5.2(i) (1986), distinguishes Davis Bacon Act projects from "servicing or maintenance work" and identifies a long list of examples of Davis Bacon Act "construction activity," including "buildings, structures, and improvements of all types," "power lines," "rehabilitation and reactivation of plants," and "excavating, clearing and landscaping." The regulation, 29 C.F.R. §§ 5.2(j) and (k), includes within the coverage of the Davis Bacon Act:

" . . . all types of work done on a particular building or work at the site thereof . . . all work done in the construction or development of the project, including without limitation, altering, remodeling, installation (where appropriate) on the site of items fabricated off-site . . . ."

In light of the statute and implementing regulations, we agree with the protester that repair activity that is in the nature of "servicing and maintenance work," rather than "construction activity" should not be considered Davis Bacon Act work. Distinguishing between these two types of activities, however, may be difficult, and some repair activities could reasonably be categorized as either Davis Bacon Act or Service Contract Act repair work depending upon the context in which they are performed.

The Army classified the sample pool of work orders based on a list of criteria. An activity that constituted routine, day-to-day work to extend the life of an item, system, or component was considered Service Contract Act work, while, for example, major work involving modifications to upgrade a facility, use new technology, standardize components, or expand capacity was considered Davis Bacon Act work. Other criteria used to identify Davis Bacon Act work included "installation of components not previously existing," "relocation of facilities," and "extension of utility systems."

Under the Army's analysis, the reconstruction of roads, bridges and culverts would be considered Davis Bacon Act work, even though the contractor is generally responsible for road maintenance. Again, the repair and replacement of utility distribution systems is classified as Davis Bacon Act work, even though the contractor must operate and maintain base utility systems. We believe that the criteria used by the Army for classifying work orders are appropriate, and that the work considered to fall within the Davis Bacon Act is not included within the operation and maintenance provisions of the RFP. The RFP defines "maintenance" as "work on equipment and facilities routinely accomplished to preclude breakdown or deterioration." Certainly, in some contexts, work such as repairing a roof would be considered repair incident to maintenance and would be included within the contractor's operation and maintenance responsibilities. In other contexts, such as repairing major roof damage or failure, the work is properly considered to be Davis Bacon Act "construction, alteration, and/or repair . . . of public buildings or public works." In our opinion, the Army's criteria for classifying Davis Bacon Act work orders reasonably capture this distinction.

#### COMPARISON WITH OTHER ARMY INSTALLATIONS

ITT also alleges that the estimated quantity of Davis Bacon Act work in this solicitation is out of line with the estimated quantities in solicitations covering comparable work at other Army installations. According to ITT, comparable base maintenance contracts estimate only 5-15 percent of the work as Davis Bacon Act activity, while the estimate for Fort Carson approximates 35 percent of the total work. This disparity, ITT argues, reflects a misinterpretation of the labor laws in Fort Carson's case.

The Army responds that the estimated extent of Davis Bacon Act work at Fort Carson is not out of line with either the Army's estimates or its experience at other installations. The Army cites 5 planned solicitations with Davis Bacon Act estimates of 30, 15, 64, 20 and 26 percent, and its experience at 3 installations where the actual rates have been 20, 40 and 20 percent. Finally, the Army explains that the differences in the age of its installations, the variation in the scope of support contracts, and the fact that some installations are using, on an experimental basis, separate task order contracts for minor construction result in wide divergence in the amount of Davis Bacon Act activity encompassed within the Army's support contracts.

The Army has provided reasonable explanations for the different percentage estimates of Davis Bacon Act type activities at its installations and has shown that the estimates rates elsewhere are comparable to Fort Carson's in many instances. Consequently, we have no reason to question our conclusion that the Army's method of classifying Davis Bacon Act work was reasonable.

#### ARMY REGULATIONS AND CONTRACTED-OUT WORK

RCA contends that the Army's review and categorization of past work orders at Fort Carson is inconsistent with Army Regulations, in particular AR 420-10, which prescribes the functions and responsibilities of the Directorate of Engineering at the base level and defines "maintenance" broadly to include work undertaken to prevent damage to a facility, while "repair" is limited to the restoration of a failed property or facility, and "construction" is limited to the erection of new facilities or additions. RCA also argues that AR 420-16, which establishes procedures for the use of particular funding accounts, distinguishes between funds allocated for repair and maintenance and those allocated for construction, and limits construction to 15 percent of maintenance and repair funds. To be consistent with these regulations, RCA contends, the Army may classify a work order as Davis Bacon Act work only if it falls within one of the two narrow definitions of "construction" or "repair" in AR 420-10, and all other activity is maintenance, covered by the Service Contract Act.

The Army regulations in question use terms--such as "construction," "repair" and "maintenance"--that are involved in determining whether a particular project falls within the Davis Bacon Act or the Service Contract Act. However, these regulations prescribe organizational functions and responsibilities within the Army and govern proper use of Army accounts; they do not interpret federal labor laws. The regulations and the definitions included in them were not drafted to serve the purpose RCA suggests, i.e., to implement the Davis Bacon Act and Service Contract Act. We therefore cannot agree that they should have been used by the Army in its application of federal labor laws to the contract work.

Finally, Pan Am points out that the Army's sample of Fort Carson's work orders includes more than 53 projects with a dollar value exceeding \$25,000, with many of those well in excess of that figure, up to \$480,407. Pan Am asserts that the Army's estimate of Davis Bacon Act work for Fort Carson includes work that, in light of its magnitude, may have been

contracted-out for accomplishment, rather than accomplished by the government work force.

The Army reports that the figures in question were extracted directly from work orders performed by Fort Carson's employees during the sample period, and this is consistent with the Army's explanation of the specific work some of the larger jobs involved, such as preparing buildings for siding. Pam Am's speculation to the contrary is unsupported and insufficient to establish its case. See Isometrics, Inc., B-219057.3, Jan. 2, 1986, 86-1 CPD ¶ 2.

The protest is denied.

*Harry R. Van Cleve*

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